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Matt Jackson

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by
MATT JACKSON*

* Assistant Professor of Telecommunications, College of Communications, Penn State University, University Park, Pennsylvania. The author would like to thank Professor Pamela Samuelson for her helpful comments on an earlier version of this article. An earlier draft of this article was presented at the Washington Area Lawyers for the Arts Copyright Symposium.

Abstract

The Digital Millennium Copyright Act of 1998 ("DMCA") is the latest in a series of laws championed by the copyright industries to give those industries greater technological control over their content. This article argues that the anti-circumvention provisions threaten free speech by giving copyright owners extralegal protection for their works.

Reliance on technology is part of a larger strategy to reprivatize copyrights by eliminating judicial oversight. Copyright as a legal concept contains numerous provisions that restrict the monopoly control granted to copyright owners. These restrictions are vital to maintaining copyright's constitutional purpose and ensuring the law does not infringe on important free speech rights. If copyright is transformed into a technological concept, courts no longer will be in a position to enforce these important limitations on copyright, and copyright owners will be able to use these extralegal protection measures to expand their control over content. This shift toward technological protection makes it more difficult for members of society to transform texts through techniques such as appropriation as a way of actively participating in the construction of their culture.

The anti-circumvention provisions of the DMCA create legal protections for the technological measures that copyright owners use to control content. Users who wish to use copyrighted works for noninfringing purposes will not be able to obtain the tools necessary for their purposes. The ultimate outcome of technological control and other attempts to reprivatize copyright (such as the DMCA's mechanisms for imposing liability on online service providers) is a dramatic reduction in the utility of communication networks like the Internet. This privatization trend is transforming the Internet from a two-way medium of active cultural participation among citizens into a one-way medium for content distribution to passive consumers.

Introduction

> "Copyright protects not just the financial interest of people who create artistic or intellectual property, but the very existence of creative work."[1]
>
> "Has it occurred to anyone that the private ownership of mass culture is a bit of a contradiction in terms?"[2]

The fate of Napster has made copyright law front-page news in recent months. The lawsuit against the file-sharing software distributor provides a unique opportunity for the public to engage in an important policy debate regarding the appropriate extent of copyright protection in a digital world. What has made significantly less news is a recent addition to the law that goes *beyond* copyright infringement. The Digital Millennium Copyright Act of 1998 ("DMCA")[3] is the latest in a series of laws championed by the copyright industries (publishing, music, film, television, and software firms) to give those industries greater technological control over their content. This article argues that this trend is part of a strategy to transform copyright from a legal concept to a technological concept in an effort to reprivatize copyright law.

Copyright as a legal concept contains numerous provisions that restrict the monopoly control granted to copyright owners.[4] These legal restrictions are vital to maintaining copyright's constitutional purpose and ensuring that the law does not infringe on important free speech rights. If copyright is transformed into a technological concept, courts no longer will be in a position to enforce these important limitations on copyright, and copyright owners will be able to use these extralegal protection measures to expand their control over content beyond accepted constitutional limits.

Expanded private control over content is worrisome because that content, be it books, newspapers, movies, music, etc., plays a large role in defining our culture and shared experience. Indeed many scholars have argued that our entire notion of reality is a social construction.[5] Even if this were an exaggeration, it is clear that

1. Jack Valenti, *There's No Free Hollywood,* N.Y. Times A23 (June 21, 2000).

2. Negativland, *Fair Use: The Story of the Letter U and the Numeral 2*, 195 (Seeland 1995).

3. 17 U.S.C. §§ 1201-1205 (2001).

4. *See generally* 17 U.S.C §§ 101-1332 (2001).

5. *See e.g.* Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (1966); Jonathan Potter, *Representing*

language and cultural texts shape our understanding of our world. Private control over content limits the ability of individuals to articulate their own meanings and thus to define their own culture, which goes to the heart of First Amendment protections for free speech.

The DMCA increases private control over content by creating legal protection for the anti-circumvention technologies that copyright owners use to control content. Users who wish to use copyrighted works for constitutionally protected purposes will not be able to obtain the tools necessary for their purposes. This creates a significant threat to free speech and cultural autonomy by making it more difficult for individuals to manipulate cultural texts (especially visual works) through practices such as appropriation and juxtaposition. These practices are an important form of political engagement since they allow citizens to take a more active role in the construction of the values and ideas that shape their society.

The ultimate outcome of technological control and other attempts to reprivatize copyright (such as the mechanisms for imposing liability on online service providers) is a dramatic reduction in the utility of communication networks like the Internet. This trend is transforming the Internet from a two-way medium of active cultural participation among citizens into a one-way medium for content distribution to passive consumers.

The copyright industries, particularly the Motion Picture Association of America ("MPAA") and the Recording Industry Association of America ("RIAA"), are working to develop anti-circumvention technology to prevent unauthorized access to their content.[6] Major copyright owners also have become extremely aggressive in enforcing their new legal rights granted by the DMCA. Examples include recent lawsuits against MP3.com, Napster, iCraveTV.com, and DeCSS.[7] Jack Valenti, head of the MPAA, acknowledged the current strategy: "If we have to file a thousand

Reality: Discourse, Rhetoric and Social Construction (1966).

6. The RIAA backs standards that protect the copyright interests of artists and labels. Matt Richtel, *Record Labels Assert Control in Cyberspace*, N.Y. Times C1 (July 5, 1999). The MPAA and major movie studios refused to release films on DVD until the consumer electronics industry included CSS, a copy protection technology in DVD players. Benny Evangelista, *Digital Dupes*, S.F. Chron. B1 (Jan. 31, 2000).

7. Evangelista, *supra* n. 6; Sara Robinson, *3 Copyright Lawsuits Test Limits of New Digital Media*, N.Y. Times C8 (Jan. 24, 2000); Denise Caruso, *Control Over Content: The Case of an Internet TV Provider Illustrates Entertainment Industry's Copyright Power*, N.Y. Times C4 (Mar. 13, 2000).

lawsuits a day, we'll do it."[8]

Many commentators argue that the expanded legal protections granted by the DMCA are giving copyright owners power that goes beyond the purpose of the copyright statute.[9] A key component of the DMCA are the anti-circumvention provisions codified in chapter twelve of the Copyright Act. These provisions are crucial to copyright owners' strategy to control content on the Internet.

The new provisions essentially make it illegal to circumvent any of the technological measures copyright owners use to control access to their content. The law contains exceptions for instances where users circumvent these measures for permissible purposes, such as fair use, reverse engineering, and encryption research.[10] However, the new law effectively outlaws the development of the circumvention tools that users would need for these permissible purposes. Without access to circumvention technologies, users will find it difficult to use content even for a legitimate, noninfringing purpose.

Prior to the DMCA, the United States Supreme Court's landmark ruling in *Universal City Studios, Inc. v. Sony Corporation of America* restricted the ability of copyright owners to sue technology distributors for contributory infringement.[11] The DMCA creates a new cause of action separate from copyright infringement and therefore outside of the limits of the *Sony* ruling. This is not the first time that copyright owners have successfully persuaded Congress to expand control over content beyond copyright infringement. Congress already had begun to control technology through amendments to the Communications Act of 1934 that prohibit the theft of cable and satellite television transmissions and through the Audio Home Recording Act of 1992 ("AHRA"),[12] which protects the technology used to prevent serial digital reproduction of sound

8. Evangelista, *supra* n. 6.

9. *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 359 (1999); Bruce Haring, *Protected or Locked Out? Foes of Copyright Act Say It Hampers Net's Growth*, USA Today, 3D (Feb. 29, 2000); Matt Jackson, *The Digital Millennium Copyright Act of 1998: A Proposed Amendment to Accommodate Free Speech*, 5 Comm. L. & Policy 61, 84-87 (2000); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 704 (2000); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 Berkeley Tech. L.J. 519, 521 (1999).

10. *See* Samuelson, *supra* n. 6. (Samuelson argues that even these exceptions are too narrow possibly to the point of being unconstitutional.).

11. 464 U.S. 417 (1984).

12. Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001-1010).

recordings.

Other commentators have done a thorough job of discussing the anti-circumvention provisions of the DMCA.[13] This article attempts to place the DMCA in the context of other attempts to control technology. At the same time, it offers an analysis of the first court case to deal directly with the anti-circumvention provisions. Furthermore, the article highlights the increased focus on technology as a means of copyright enforcement. These laws signal an attempt by the copyright industries to convert copyright from a legal concept to a technological concept. This shift to technological protection measures gives copyright owners extralegal control over their works. Thus, it is one more means of "self-help" to control content.[14] The basic dilemma for policymakers is that the Internet is designed to facilitate the *two-way* communication of content, while the copyright industries traditionally have relied on *one-way* distribution of content.

In *Universal City Studios, Inc. v. Reimerdes*, one of the first cases applying the new anti-circumvention measures of the DMCA, the district court exemplified this paradigm shift by refusing to consider any standard copyright defenses.[15] This case, currently under appeal at the Court of Appeals for the Second Circuit, highlights three fundamental tensions surrounding the DMCA:

- Is the fair use doctrine constitutionally mandated to reconcile copyright with the Copyright Clause and the First Amendment?
- Can Congress give copyright owners powers that extend their control beyond the Copyright Clause?
- Can Congress constitutionally overturn the staple article of commerce doctrine articulated in the *Sony* case if doing so significantly infringes on free speech?

I
Copyright's Purpose and Technological Change

The goal of copyright law is to give the creator limited control over her work to provide an incentive for the creation of new works

13. *See* Nimmer, *supra* n. 9; Samuelson, *supra* n. 6.

14. For a more extended discussion of copyright owners' attempts to rely on "self-help" measures, see Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 Berkeley Tech. L.J. 161 (1997); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 Berkeley Tech. L.J. 1089 (1998).

15. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000).

for the public's benefit.[16] Copyright, thus, strives to provide a "balance" between the creator's need to recoup her investment in the work and the ultimate goal of providing the public with as much access to the work as possible.[17] The Supreme Court has articulated this goal on many occasions, including this succinct summary:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.[18]

One cannot overemphasize that the constitutional purpose of copyright is to stimulate content creation for the public's benefit, *not* to create a private property right based on a moral notion of ownership.

The conundrum for copyright is how to create the appropriate level of incentives. If too much protection is given, access to the work is unduly restricted. If too little protection is given, the optimum number of works might not be created. As Landes and Posner note, "For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection."[19]

Maintaining this delicate balance has become increasingly difficult as new means of producing and distributing content have been developed. Digital communication, in general, and the Internet

16. William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Leg. Stud. 325, 326 (1989).

17. Copyright is considered necessary because information products are similar to "public goods" in that they are often nonrivalrous and nonexclusive. Traditionally, these qualities lead to underproduction of the product in the private marketplace. Copyright creates a legal right to exclude as a means of helping the market for information products operate more like markets for excludable products. Given the space constraints of this paper, it will be assumed that the reader is familiar with the basic economic theories that underlie the enactment of United States copyright law.

18. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnotes and citations omitted).

19. *Id.* at 326.

in particular, have dramatically reduced production and distribution costs. Unlike previous reproduction technologies that were either capital-intensive (a printing press) or labor-intensive (a copy machine), the Internet allows for cheap and effortless reproduction *and* distribution. Copyright holders have argued vigorously that expanded protection is now necessary because the increased ease of infringement outweighs any cost savings that copyright owners might realize through their own use of this new technology.[20] What's more, copyright owners have argued that new enforcement mechanisms are required to combat infringing activity. They claim that simply increasing the penalty for piracy is not enough; that self-help measures are the only effective means to prevent widespread infringement.

Today, copyright law is being supplanted with technological measures developed by copyright owners to provide extralegal protection for their works. These "self-help" measures (often grouped under the heading of digital rights management or DRM) provide almost limitless opportunities for content control, including digital watermarks, encryption, anti-copying codes, pay-per-use systems, and verification systems that allow content to be viewed only on a particular machine. The most common types of self-help measures in use today are those that restrict initial access to a work (such as encryption of satellite transmissions and CSS to prevent copying of DVDs) and those that prevent copying of the work (such as Macrovision to prevent copying of analog videocassettes).[21]

Digital rights management systems likely will become much more effective and efficient in preventing copyright infringement than

20. *See e.g.* H.R. Subcomm. on Courts and Intell. Prop. of the H.R. Jud. Comm., *NII Copyright Protection Act of 1995: Hearings on H.R. 2441*, 104th Cong., 21-22, 35, 69 (Feb. 7, 1996) (statement of Jack Valenti, Chairman, Motion Picture Assn. of Am.)[hereinafter *NII Copyright Protection Act of 1995*]; *id.* (statements of Jack Valenti, Chairman, Motion Picture Assn. of Am.; Edward P. Murphy, Pres. Natl. Music Publishers Assn.; and Barbara Munder; Senior Vice-Pres., McGraw-Hill Cos.); H.R. Subcomm. on Courts and Intell. Prop of the H.R. Jud. Comm., *Copyright Infringement Liability of Online and Internet Service Providers: Hearings on S. 1146*, 105th Cong. (Sept. 4, 1997); H.R. Subcomm. on Courts and Intell. Prop. of the H.R. Jud. Comm., *Online Copyright Liability Limitation Act: Hearings on H.R. 2180*, 105th Cong. (Sept. 16-17, 1997).

21. The motion picture industry argues that CSS is an access control rather than a copying control. Yet, the supposed purpose is to prevent DVDs from being played on unauthorized machines that would allow copying. For a general discussion of the possibilities and potential pitfalls of trusted systems, see Mark Gimbel, Note, *Some Thoughts On the Implications of Trusted Systems for Intellectual Property Law*, 50 Stan. L. Rev. 1671, 1675-80 (1998); Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 Berkeley Tech. L.J. 137, 138-40 (1997).

traditional legal remedies. Therefore, they may serve an important function in enhancing the constitutional goal of providing incentives for the creation of new works.[22] The potential danger, however, is that copyright owners can use these technological measures not only to prevent infringement, but also to avoid the limitations that copyright law places on their monopoly privilege.

II
Constitutional Limits on Copyright – Fair Use and the First Amendment

While the copyright law has changed dramatically over the years as the result of lobbying by various interest groups, the statute must still serve its constitutional purpose as outlined in Article I, section 8.[23] The statute contains numerous provisions restricting the ability of copyright holders to enforce their monopoly, both to serve the constitutional mandate of "promoting progress in science and the useful arts," and to ensure the statute does not trample on First Amendment protections for free speech.[24] The courts normally have the authority and duty to ensure that copyright law does not exceed the restraints imposed on it by the Constitution.

Even with the limited duration of the copyright term and the lack of protection for ideas, facts, and discoveries (often referred to as the idea/expression dichotomy), lawmakers repeatedly have acknowledged that the rights granted to the copyright holder are extremely broad and potentially counterproductive. Thus, the copyright statute includes a number of exceptions to the copyright holder's monopoly.[25] Many of these exceptions have been carved out for powerful special interest groups. For example, the statute contains

22. However, assuming that DRM systems do make copyright more efficient, this implies that the rights granted to the copyright owner can be defined more narrowly to maintain an equitable balance between creators and users.

23. U.S. Const. art. I, § 8, cl. 8. The purpose of copyright is to "Promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

24. For a recent discussion on this point, see Benkler, *supra* n. 9. Professor Benkler argues that from a First Amendment perspective, the baseline should be the public domain which allows for access and use of information. *Id.* All restrictions on the public domain, including the provisions of the Copyright Act, should be viewed as content-neutral restrictions on speech for First Amendment analysis. *Id.*

25. Sections 107-121 of the Act place limitations on the copyright holder's exclusive rights. 17 U.S.C. §§ 107-121 (2000).

numerous provisions that benefit educators and librarians.[26] In addition to these specific exceptions, there are some broad limits on the copyright holder's monopoly.[27] The most important limitation is that of fair use.[28]

Fair use furthers the goals of copyright by limiting the power of the copyright owner to control certain uses of the work. As the United States Supreme Court noted in *Campbell v. Acuff-Rose Music*, "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'"[29] The statute offers a nonexclusive list of potential fair uses of copyrighted works, including "criticism, comment, news reporting, teaching ... scholarship, or research."[30] Fair use allows a software developer to use reverse engineering to build on the work of others,[31] and permits newspapers to quote from books and scholars to quote from journal articles.[32] All of these uses benefit society by propagating the ideas expressed in the copyrighted work.

In addition to protecting copyright's statutory purpose, fair use plays an important role in upholding First Amendment free speech rights. Fair use allows individuals to quote directly from the works they are debating, thus supporting an "uninhibited, robust, and wide-open" debate.[33] Direct quotation is often the only effective means of participating in that debate, especially when the work in question is primarily visual in nature. In *Wojnarowicz v. American Family Association.*, the American Family Association ("AFA") produced a pamphlet protesting government funding for art.[34] The pamphlet used

26. *Id.* §§ 108, 110.

27. For example, the first sale doctrine prevents the copyright owner from controlling the subsequent sale or transfer of any particular copy or phonorecord in most instances. *Id.* §109.

28. *See* 17 U.S.C. § 107.

29. 510 U.S. 569, 575 (1994).

30. 17 U.S.C. § 107.

31. *Sega Enterprises v. Accolade, Inc.*, 977 F.2d 1510, 1514 (9th Cir. 1993).

32. As one court noted, "The interview is an invaluable source of material for social scientists, and later use of verbatim quotations within reason is both foreseeable and desirable." *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987). However, fair use does not create an unlimited license to quote from texts. *See Harper & Row Publishers, Inc. v. The Nation*, 471 U.S. 539 (1985) (holding that copying 300 words from an unpublished manuscript was not a fair use).

33. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). For example, reproducing a picture in order to criticize government funding for the artist was held to be a fair use in *Wojnarowicz v. Am. Fam. Assn.*, 745 F. Supp. 130 (S.D.N.Y. 1990).

34. *Id.* at 134.

samples of Wojnarowicz's work as examples of publicly funded art of which the AFA disapproved.[35] The court held that copying the original art was protected by fair use because the dominant purpose for the reproduction was criticism.[36] In *Time, Inc. v. Bernard Geis Association*, where the defendant copied frames from the famous Zapruder film of President Kennedy's assassination, the court held that the defendant's use was fair use, in part because "[t]here is a public interest in having the fullest information available on the murder of President Kennedy."[37]

Fair use also allows citizens to regain control over their culture in an era when the copyright industries have commodified much of the cultural landscape.[38] Fair use gives the audience power over the discourse which shapes their lives. Author Salman Rushdie observes that "[t]hose who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts."[39]

The dominant groups in a society, with their ability to gain access to traditional media systems, have unbridled power in communicating their messages to the public. What prevents these groups from exerting a completely hegemonic influence is the ability of individuals and weaker groups to create resistant or oppositional readings of these messages.[40] Quoting from popular texts is a powerful tool in the creation of resistant readings of those texts. "The act of appropriating from this media assault represents a kind of liberation . . . it is a much needed form of self-defense against the one-way, corporate-consolidated media barrage . . . . Appropriators claim the right to

35. *Id.*

36. *Id.* at 134, 143, 147.

37. 293 F. Supp. 130, 146 (S.D.N.Y. 1968); *cf. Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

38. Jackson, *supra* n. 9, at 84-87.

39. Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1536 (1993) (quoting Salman Rushdie, Excerpts from Rushdie Address: 1,000 Days 'Trapped Inside a Metaphor,' N.Y. Times B8 (Dec. 12, 1991)).

40. Stuart Hall, *Encoding/decoding*, in *Culture, Media, Language* 128 (Hutchinson & Co. (Publishers) Ltd. 1980). The concept that the reader plays an active role in constructing the meaning of a text is not new. Literary studies have long considered various ways in which meaning is constructed. One popular paradigm is semiotics, whose leading proponent was Roland Barthes. *See* Roland Barthes, *S/Z* (Richard Miller, trans., Hill and Wang 1974); Terence Hawkes, *Structuralism and Semiotics* (U. Cal. Berkeley Press 1977). For a comparison of various theories of interpretation, see Norman Holland, *The Critical I* (Columbia U. Press 1992).

create with mirrors."[41] Rosemary Coombe argues that in a postmodern world, "political action must involve a critical engagement with commodified cultural forms."[42] The ability to use popular (copyrighted) expression, which has entered the public vernacular, is an essential component of this process. Similarly, Elkin-Koren argues that:

> [T]he struggle over meaning making [is] the essence of political action in postmodernity. Culture is thus perceived as an ongoing process of meaning-making through communicative activities, that is through social dialogue .... Social agents enjoy different levels of power to fix and transform meaning depending on their ability to access and control access to sources of signification and circulation.[43]

Even if one rejects the postmodern perspective that politics is essentially the struggle over interpretation, it is clear that once a message has been communicated to the public, quoting from that text is an important means of critiquing the message. Appropriation, which allows individuals to juxtapose disparate elements and give them new meanings, has long been used as a means of commenting on society, and on media messages in particular.[44] In *Campbell v. Acuff-Rose,* the United States Supreme Court noted that an important goal of fair use is to allow for transformative works.[45]

> Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the

41. Negativland, *supra* n. 2, at 196. The history of modern art is filled with examples of "quotes" from various texts being placed in a new context in order to provoke new ways of thinking about the original text. *See* Eddie Wolfram, *History of Collage* (Macmillan Publg. Co., Inc. 1975).

42. Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 Tex. L. Rev. 1853, 1855 (1991); *see also* Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights*, 68 Chi-Kent L. Rev. 805 (1993).

43. Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 Cardozo Arts & Ent. L.J. 345, 400 (1995).

44. *See generally* E.K. Ames, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 Colum. L. Rev. 1472 (1993); *see also* S. Del Peral, *Using Copyright Visual Works in Collage: A Fair Use Analysis*, 54 Alb. L. Rev. 141 (1989).

45. 510 U.S. 569, 579 (1994) (citation omitted).

confines of copyright.[46]

The ability to appropriate and transform texts allows groups outside the mainstream to resist hegemony. In short, the ability to quote from a text can be essential to constructing an effective critique of that text and the ideas it embodies.

Texts in this context mean much more than written or printed materials. The anti-circumvention restrictions discussed in this paper do not significantly threaten the quotation of written texts because those texts can be transcribed, albeit tediously. However, transcription is almost meaningless when the content is a picture or moving image. As the band Negativland notes:

> We are now all immersed in an ever-growing media environment—an environment just as real and just as affecting as the natural one from which it somehow sprang. Today we are surrounded by canned ideas, images, music, text . . . . Large increments of our daily sensory input are not focused on the physical reality around us, but on the media that saturates it.[47]

For visual works, direct copying is necessary to effectively comment on the work. For example, in the video *Dreamworlds,* Professor Sut Jhally of the University of Massachusetts juxtaposed scenes he copied from music videos on MTV with a rape scene from a movie to suggest that music videos contain images of sexual violence.[48] Many commentators argue that this right lies at the heart of fair use exception for comment and criticism.[49] Thus, the *right* to quote from a text is an important means of furthering First Amendment goals since it facilitates the debate over ideas and values. Overall, fair use operates as a "safety valve" to prevent the copyright statute from trampling First Amendment rights by allowing for certain unauthorized uses of copyrighted works without liability for copyright infringement.[50]

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46. *Id.* at 579.

47. Negativland, *supra* n. 2, at 195-96.

48. David Kaplan, *They Want Their MTV Back*, Newsweek 68 (May 20, 1991).

49. *See* Ames, *supra* n. 44; Del Peral, *supra* n. 44. For a discussion of the importance of fair use for media criticism in particular, see Matt Jackson, *Commerce Versus Art: The Transformation of Fair Use*, 39 J. Broad. & Elec. Media 190 (1995).

50. Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, 20-21 (Hill & Wang 1994). In the 1970's, much legal scholarship argued that fair use was especially important from a First Amendment perspective. *Id.* Beginning in the 1980s,

III
Technology and Contributory Infringement

While fair use is codified in the Copyright Act, the legal right becomes meaningless if users are unable to take advantage of it. As communication technology has advanced, various technologies make it possible for individuals to appropriate copyrighted material for permissible (or infringing) purposes. Sut Jhally used videotape technology to create *Dreamworlds*; Public Enemy, Negativland, and many others use audio recording technology to create their works. Until recently, there was little that copyright owners could do to prevent users from engaging in fair use activities. If the copyright owner felt that the use was not fair, she could sue the alleged infringer in court. The court would determine whether the use was fair. Because finding and suing individual infringers is often difficult and impractical, copyright owners have attempted to use the doctrine of contributory infringement to control the use of technology that facilitates infringement.

Contributory infringement is a doctrine developed by the courts to hold a "third-party" liable for the actions of the direct infringer.[51]

> The Copyright Act does not expressly render anyone liable for infringement committed by another ... [but] [t]he absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activities. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.[52]

Contributory infringement occurs when the third party (1) knows the infringement is taking place and (2) "induces, causes, or materially contributes to the infringing conduct."[53] In applying the test for contributory infringement, courts use the constructive knowledge standard; asking whether the defendant knew *or should have known*

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many fair use analyses have focused on problems of market failure rather than free speech concerns. Benkler, *supra* n. 9, at 389-90.

51. *Sony*, 464 U.S. at 434-35 (footnote omitted).

52. *Id.*

53. *Gershwin Publg. Corp. v. Columbia Artists Mgt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (holding that a management firm that authorized performance of copyrighted works is liable for contributory infringement).

that infringing activity was taking place. The difficulty in determining when contributory infringement takes place was acknowledged by the Supreme Court in *Kalem Company v. Harper Brothers*: "In some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer."[54]

More than seventy years later, the Court again had to address "articles of commerce" in the landmark decision of *Universal City Studios v. Sony Corporation of America*.[55] In *Sony*, the Court stated, "[T]he contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible."[56] In *Sony*, the issue was whether selling videocassette recorders ("VCRs") equipped with television tuners constituted contributory infringement.[57] The plaintiffs in *Sony* argued that end users purchased VCRs and then committed copyright infringement by taping copyrighted programs off the air.[58]

Since the *Sony* case involved the sale of hardware rather than the sale of copyrighted content,[59] the Court borrowed from the doctrine of contributory infringement under patent law rather than applying the test for contributory liability developed in previous copyright cases.[60] The Court held that, "[T]he sale of copying equipment, like the sale of other *articles of commerce*, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."[61] The *Sony* Court rejected the argument that "supplying the 'means' to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement."[62]

For sixteen years, the *Sony* case has stood for the proposition

54. 222 U.S. 55, 62 (1911).
55. 464 U.S. 417.
56. *Id.* at 442.
57. *Id.* at 419-21.
58. *Id.*
59. There is an extensive line of cases dealing with contributory infringement in circumstances that do not involve staple articles of commerce. This paper focuses on the *Sony* case because it is most relevant in discussions of sections 1201(a)(2), 1201(b)(1), and the *Reimerdes* case.
60. *Sony*, 464 U.S. at 419.
61. *Id.* at 442 (emphasis added).
62. *Id.* at 436.

that copyright owners cannot restrict the use of technology merely because that technology *may* be used to commit infringement. Defendants can be held liable only when the technology has no substantial noninfringing uses. Thus, copyright owners cannot easily sue the manufacturers of photocopiers or other equipment that allow end-users to commit copyright infringement. Indeed, when photocopiers were first put into widespread use in libraries, copyright owners sued the libraries rather than the companies that manufactured or distributed the photocopiers.[63]

The *Sony* doctrine was cited in *Vault Corp. v. Quaid Software Ltd.*, a case specifically related to circumvention technology.[64] In the case Vault created a diskette that prevented the unauthorized copying of any computer program placed on the disk.[65] Quaid created a diskette that essentially allowed users to make fully functional copies of the software program stored on the Vault diskette.[66] Quaid acknowledged that many users would use this feature to commit copyright infringement but that section 117 of the Copyright Act permits users to make archival copies of software programs. [67] Quaid argued that since its diskette allowed users to make permissible archival copies, it had a substantial noninfringing use. [68] The Court of Appeals agreed and held that, under *Sony*, Quaid was not liable for contributory infringement.[69]

However, lower courts have not extended the "staple article of commerce" doctrine used by the Court in *Sony* to situations where the manufacturer of the technology has direct knowledge of the infringing activity and an ongoing relationship with the direct infringer. In a case where the defendant manufactured time-loaded cassettes,[70] the defense argued that these blank cassettes have a substantial, noninfringing use in that they can be used to duplicate authorized or noncopyrighted sound recordings.[71] The District Court reasoned that "[the *Sony* holding] would not extend to products

63. *See e.g. Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Supreme Court*, 420 U.S. 376 (1975).

64. 847 F.2d 255 (5th Cir. 1988).

65. *Id.* at 256.

66. *Id.* at 257.

67. *Id.* at 262.

68. *Id.*

69. *Id.* at 256-57, 262-67.

70. Cassettes loaded to a customized time length, rather than standard 30, 60, or 90-minute lengths.

71. *A&M Records, Inc. v. General Audio Video Cassettes, Inc.*, 948 F. Supp 1449, 1456 (C.D. Cal. 1996).

specifically manufactured for counterfeiting activity, even if such products have substantial noninfringing uses."[72] In this case, there was overwhelming evidence that the defendant knew that the cassettes would be used to duplicate infringing recordings, and that he provided other services in addition to supplying the blank cassettes.[73] In a case involving copyright infringement in the manufacture of computer chips to illegally intercept satellite television programming, the Eleventh Circuit rejected the *Sony* defense of "substantial, noninfringing uses" because the defendant actively promoted the device as an aid to infringement, and not for "legitimate, noninfringing uses."[74]

Most recently, the Ninth Circuit ruled that Napster could not rely on the *Sony* defense.[75] The court stated:

> We are compelled to make a clear distinction between the architecture of the Napster system and Napster's conduct in relation to the operational capacity of the system .... The distinction shows that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement. Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.[76]

The court stressed that, unlike the VCR manufacturers in *Sony*, Napster did more than merely distribute a technology; it also operated a system of servers that facilitated the infringing activity.[77]

IV
Legislative Initiatives that Limited *Sony*

The *Sony* case severely limited the ability of copyright owners to restrict the development of new technologies related to content distribution and reproduction. Copyright owners instead turned their attention to specific legislation that would protect *their* use of

72. *Id.*
73. *Id.*
74. *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 846 (11th Cir. 1990).
75. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-21 (9th Cir. 2001).
76. *Id.*
77. *Id.*

technology to control content. Two key areas where this battle was fought were cable/satellite television distribution and digital music recordings.

A. Cable/Satellite Black Boxes

Cable providers have been concerned with the theft of cable service for a long time, especially the loss of income from the theft of lucrative pay channels such as HBO and Showtime. Individuals could buy "black boxes" to decode scrambled cable signals. In addition, the cable television industry relied on satellite distribution of programming, leading to the increased popularity of television receive-only ("TVRO") satellite dishes. Programming distributors began to scramble their satellite signals, resulting in the proliferation of satellite "black boxes" that could descramble the signals. Congress eventually amended the Communications Act of 1934[78] to prohibit the manufacture or distribution of technology designed to decrypt cable and satellite television programming.[79]

Because these prohibitions are contained in the Communications Act, they neither affect nor are affected by copyright law. Theft of programming service, in and of itself, does not technically constitute copyright infringement, since none of the copyright holder's rights are violated.[80] The access restrictions are narrowly drawn to cover only the *transmission* of television programming. Once an individual has gained authorized access to the programming, there is no law banning the use of technology that may aid in copyright infringement such as VCRs.

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78. 47 U.S.C. §§ 151-615 (2001). [hereinafter *Communications Act*].

79. The prohibition on theft of cable service is codified in section 553 and the prohibition on interception of wireless (including satellite) service are codified in section 605. *Id.* § 605. Section 553(a) provides: (1) No person shall intercept or receive or *assist in intercepting or receiving* any communications service offered over a cable system . . . (2) . . . the term "assist in intercepting or receiving" shall include the manufacture or distribution of equipment intended . . . for unauthorized reception [of cable service]. *Id.* § 553(a) (emphasis added). Section 605(e)(4) provides:

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any . . . device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of [satellite programming] shall be fined not more than $500,000 . . . or imprisoned for not more than 5 years for each violation, or both.

Id. § 605(e)(4).

80. Similarly, stealing a book from a store is theft rather than infringement.

B. Serial Copy Management Systems

The Communications Act restrictions only cover access to cable and satellite television transmissions. With the proliferation of digital technology, content providers became concerned about the ability of consumers to make endless, perfect digital reproductions of their works. The RIAA fought the introduction of digital audio tape ("DAT") recorders and eventually convinced Congress to pass the Audio Home Recording Act of 1992 ("AHRA").[81] The AHRA required that all consumer-grade digital audio recording devices come equipped with the Serial Copy Management System (SCMS) or some other system that prevents consumers from making serial digital copies.[82] In addition, the law banned the distribution of devices that were designed to circumvent the SCMS.[83] Section 1002(c) states:

> No person shall import, manufacture, or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any [technology that prevents serial copying].[84]

The AHRA created, for the first time in copyright law, a cause of action separate from copyright infringement. In addition, this was the first time that restrictions were placed on technology to prevent *copyright infringement*, as opposed to the Communication Act's restrictions on technology to prevent *unauthorized access* to a transmission. However, the AHRA was narrowly tailored to prevent serial digital audio copying only; therefore, the new law did not ban all digital copying technology.

With the advent of MP3 files, thousands of individuals began to download music from the Internet. Early on, this craze was limited to listening to music while sitting at a computer. Capitalizing on the popularity of portable CD players, Diamond Multimedia developed a portable MP3 listening device known as the "Rio" that allows users to transfer MP3 files from a computer hard drive to the Rio player.[85] The

81. Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001-1010 (2001)).

82. 17 U.S.C. § 1002(a). The purpose of the law was to prevent individuals from making a digital copy of sound recording and then using that copy to make more digital copies.

83. *Id.* § 1002(c).

84. *Id.*

85. Michel Marriott, *Portable Music Player Uses No Tape or Disk*, N.Y. Times G3

RIAA sued Diamond Multimedia for violating the AHRA.[86] The Ninth Circuit held that Diamond's Rio portable MP3 player was not a digital audio recording device as defined by the AHRA and therefore not subject to the AHRA's restrictions.[87]

V
The Anti-Circumvention Provisions of the DMCA

The DMCA added a new chapter to the Copyright Act that focuses on protecting anti-circumvention technology rather than adjusting the bundle of rights granted to a copyright holder.[88] The DMCA extended legal protection to the technological measures that copyright owners use to safeguard their monopoly privilege. In doing so, Congress went significantly beyond the narrow provisions in the AHRA and the Communications Act. The DMCA protects technological measures that control all access to a work rather than only controlling access to transmissions (as in the Communications Act), and technological measures that prevent *any* unauthorized use of the work, rather than measures that prevent only serial copying (as in AHRA).

The new Chapter Twelve contains three major provisions designed to protect the technology that copyright owners use to restrict the use of their content: (1) a provision that prohibits the circumvention of controls that prevent unauthorized access to a work, (2) a provision that prohibits the distribution of technology that circumvents controls that prevent unauthorized access to a work, and (3) a provision that prohibits the distribution of technology that circumvents controls that protect the rights granted to the copyright owner.[89]

Subsection 1201(a)(1) states, "No person shall circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act]." This subsection took effect in November of 2000, after a rulemaking proceeding by the Librarian of Congress determined whether any users of any specific "class of works" would be adversely affected in their ability to make

(Sept. 24, 1998).

86. *Recording Indus. Assn. of Am., Inc. v. Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d 624 (C.D. Cal. 1998); *aff'd on other grounds*, 180 F..3d 1072 (9th Cir. 1999).

87. *Recording Indus. Assn. of Am., Inc. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999).

88. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

89. 17 U.S.C. § 1201 (2001).

noninfringing uses of that particular class of works.[90] For example, if the rulemaking proceeding determined that librarians would be unable to make legitimate noninfringing uses of databases, then they would be permitted to circumvent the technological measures used to restrict access to the work. The law requires the Librarian of Congress to repeat this rulemaking process every three years.[91] According to the report that accompanied the DMCA, the purpose of the delay in the enactment of this clause and the requirement that a rulemaking proceeding take place every three years was to ensure the "availability of works in the marketplace for lawful uses."[92]

On October 27, 2000, the Librarian of Congress determined that the only two classes of works that would be exempt from section 1201(a)(1) would be: (1) compilations consisting of lists of websites blocked by filtering software applications and (2) literary works, including computer programs and databases, protected by access control mechanisms that failed to permit access because of malfunction, damage or obsolescence.[93]

The other two provisions of Chapter 12 took effect when the law was enacted on October 28, 1998. Section 1201(a)(2) prevents manufacturing, importing, or otherwise trafficking in "any technology, product, service, device, component, or part thereof" that (A) is primarily designed to circumvent a technological protection measure that effectively controls access to a work, (B) "has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work," or (C) is marketed with knowledge that it will be used to circumvent a technological measure that effectively controls access to a work.[94] This section prohibits *trafficking* in circumvention technology that effectively controls access to a work, whereas section (a)(1) prohibits the *use* of circumvention technology.[95]

Section 1201(b)(1) is almost identical to section 1201(a)(2). This

90. *Id.* § 1201(a)(1).

91. *Id.* § 1201(a)(1)(C).

92. H.R. Rpt. 105-551(II), at § 37 (July 22, 1998). The House Report indicates the rulemaking proceeding should be repeated every two years. *Id.* This was changed in § 1201(a)(1)(C) to three years. 17 U.S.C. § 1201(a)(1)(C).

93. *Exemption to Prohibition on Circumvention of Copy. Protection Sys. for Access Control Tech.*, 65 Fed. Reg. 64556-64562 (Oct. 27, 2000) (to be codified at 37 C.F.R. pt. 201).

94. 17 U.S.C. § 1201(a)(2). The law contains specific exemptions too detailed to discuss here. For an analysis of all the anti-circumvention provisions, see Samuelson, *supra* n. 9.

95. *Cf. id.* § 1201(a)(1).

section prohibits trafficking in any device that circumvents a protection measure that protects *a right of the copyright owner.* [96] While section 1201(a)(2) prohibits trafficking in devices that provide unauthorized access to a copyrighted work (even if no copyright infringement takes place), section 1201(b)(1) prohibits trafficking in devices that circumvent a protection measure and thereby facilitate copyright infringement (regardless of whether access to the work is authorized).

For example, a copyright owner might employ two separate protection measures: one that prevents unauthorized access to the work and another that prevents unauthorized reproduction of the work (reproduction being one of the rights granted to the copyright owner). Section 1201(a)(1) prohibits the circumvention of the first protection measure, section 1201(a)(2) prohibits the distribution of devices which defeat the first protection measure, and section 1201(b)(1) prohibits the distribution of devices that defeat the second protection measure.

There is no corresponding section banning the use of devices prohibited by section 1201(b)(1) because any use of a device that circumvents the technology used by the copyright holder to protect her rights is restricted by the Copyright Act itself. For example, assume that a CD comes with special software that prevents the user from making a copy of the CD. If the user circumvents the anti-copying software, the user is potentially liable for violating the copyright owner's reproduction right. Such a violation does not need to be banned by section 1201(b), since it is already considered an infringement of the Copyright Act. Section 1201(b)(1) merely prohibits the trafficking in devices that allow the user to circumvent the anti-copying software contained on the CD. The obvious flaw in this system is that there are many instances where circumventing the anti-copying software would *not* result in liability for infringement under the Copyright Act. For example, there is probably no infringement if the user makes a copy of the CD for the purpose of listening to the music on a portable cassette deck. So while the user may have the legal right to circumvent the anti-copying software, the distribution of devices that facilitate circumvention is prohibited.

The anti-circumvention provisions of the DMCA were part of the United States' response to the World Intellectual Property Organization (WIPO) Copyright Treaty, passed in December 1996.[97]

96. *Id.* § 12001(b)(1).

97. WIPO Copyright Treaty (Apr. 12, 1997), Sen. Treaty Doc. No. 105-17.

The WIPO Copyright Treaty requires, among other things, that countries "provide 'adequate protection' against the circumvention of technical measures used by copyright owners to protect their works from infringement ... ."[98] Copyright scholar Pamela Samuelson argues that the DMCA's anti-circumvention provisions go far beyond the protection required by the WIPO Copyright Treaty and that the new law does not provide enough exceptions for permissible circumvention.[99]

VI
The Reimerdes Case[100]

On August 17, 2000, in one of the first legal tests of these new provisions, a district court granted a permanent injunction against defendants who placed decryption software on their web sites.[101] In *Universal City Studios, Inc. v. Reimerdes,* the defendants operated web sites that distributed DeCSS, a software utility that circumvents Content Scramble System (CSS).[102] CSS is an encryption program that controls access to digital versatile disks (DVDs).[103] CSS allows the playback, but not the copying, of DVDs on authorized playback machines such as DVD players and DVD hard drives used with certain computer operating systems.[104] The motion picture industry also uses CSS to control which regions of the world will have access to a particular DVD at a particular time in order to engage in sequential release of the film.[105] A Norwegian teenager created Decrypt CSS

98. Samuelson, *supra* n. 9, at 521.

99. *Id.* at 534-57; *see also* Benkler, *supra* n. 9, at 416-30; Nimmer, *supra* n. 9.

100. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000). Reimerdes settled with the plaintiffs after the preliminary injunction was issued. Eric Corley, who publishes *2600: The Hacker Quarterly,* and maintains the 2600.com web site, was the primary defendant when the decision was handed down in August 2000 and is the principal defendant on appeal. *Id.* at 308.

101. *Reimerdes*, 111 F. Supp. 2d at 345. The case is currently on appeal before the Second Circuit. Rita Ciolli, *Appeals Court Hears Case on DVD Code: High Stakes in Encryption-As-Free-Speech Issue,* Newsday A45 (May 1, 2001). Initial appellate briefs were filed in January and February 2001.

102. *Id.* at 303.

103. *Id.* at 308.

104. *Id.*

105. Mike Godwin, *Digital Millennium Copyright Act Spurs Controversy,* E-Commerce Law Weekly <http://www.law.com> (May 1, 2000). The practice of using separate release "windows" for different media and different geographic locations allows the distributor to extract the maximum revenues from each user population. Bruce M. Owen & Steven S. Wildman, *Video Economics*, 26-52 (Harvard U. Press 1992).

(DeCSS) to break the CSS copy protection system.[106] DeCSS soon began appearing on numerous web sites in the United States and abroad.[107]

The Motion Picture Association of America was successful in convincing most web sites to remove DeCSS voluntarily.[108] Eight motion picture companies then sued the defendants, who had refused to remove DeCSS from their web sites, for violating section 1201(a)(2) of the Copyright Act.[109] Judge Lewis Kaplan of the Southern District of New York granted a preliminary injunction on January 20, 2000.[110] After Judge Kaplan's preliminary injunction was issued, the defendants removed DeCSS from the www.2600.com web site and instead created links to numerous sites where users could still download DeCSS.[111] The court issued a permanent injunction against Corley in August 2000.[112]

A. Rejection of Statutory Defenses

Under section 1201(a)(2)(B), a defendant is liable for trafficking in circumvention technology if that technology "has only limited commercial significant purpose or use other than to circumvent a technological measure that effectively controls access to a work."[113] The defendants argued that the purpose of the DeCSS software was to allow users to play DVDs on computers that use the Linux (rather than Windows) operating system and that this is a permissible reason to circumvent the access technology.[114] The court rejected this argument because the purpose of DeCSS was to circumvent technology, and the reason for circumventing the technology was irrelevant under the DMCA.[115] The court held:

> [D]efendants offered and provided DeCSS by posting it on their web site. Whether defendants did so in order to infringe, or to permit or encourage others to infringe, copyrighted works in violation of other provisions of the Copyright Act simply does not matter for the purpose of

106. *Reimerdes*, 111 F. Supp. 2d at 311.
107. *Id.*
108. *Id.* at 312.
109. *Id.* at 303.
110. *Id.* at 312.
111. *Id.* at 313.
112. *Id.* at 344-45.
113. 17 U.S.C. § 1201(a)(2)(B).
114. *Reimerdes*, 111 F. Supp. 2d at 319.
115. *Id.* at 319.

Section 1201(a)(2).[116]

The defendants also tried to avail themselves of the exceptions to copyright infringement contained in the statute by arguing that their activity was protected by fair use.[117] The court made clear in no uncertain terms that this limitation on copyright liability did not apply since the defendants were not being sued for copyright infringement.[118] The court held that the defendants could not raise a fair use defense since they were not sued for copyright infringement.[119] The court stated:

> Defendants, however, are not here sued for copyright infringement. They are sued for offering to the public and providing technology designed to circumvent technological measures that control access to copyrighted works and otherwise violating Section 1201(a)(2) of the Act. If Congress had meant the fair use defense to apply to such actions, it would have said so. Indeed, as the legislative history demonstrates, the decision not to make fair use a defense to a claim under Section 1201(a) was quite deliberate.[120]

The court also noted that Congress had specifically and purposefully written the law in such a way so that the *Sony* case would not apply to violations of section 1201.[121]

Additionally, in fighting the preliminary injunction in January 2000, one defendant tried to claim immunity under section 512 of the Copyright Act, which limits the liability of Internet service providers for third-party infringement.[122] This section was included in the DMCA along with the anti-circumvention provisions.[123] The court held that section 512, like fair use, only applies to acts of infringement, not to the distribution of circumvention technologies.[124]

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116. *Id.*
117. *Id.* at 321-24.
118. *Id.* at 322.
119. *Id.*
120. *Id.*
121. *Id.* at 323-24.
122. *Universal City Studios, Inc. v. Reimerdes,* 82 F. Supp. 2d 211, 217 (S.D.N.Y. 2000).
123. For a discussion of section 512 of the DMCA, see Jackson, *supra* n. 9.
124. *Reimerdes*, 82 F. Supp. 2d at 217 (That defendant settled out of court before the permanent injunction was issued and the issue of ISP liability was not addressed in the court's August 17 decision.).

B. Linking Issues

A major issue that was not addressed when the court first granted its preliminary injunction was whether the defendants could link to other sites that offered the DeCSS software. Judge Kaplan noted that the statute makes it unlawful "to offer, provide, or otherwise traffic in described technology."[125] The court then articulated, for the first time, a test for trafficking in anti-circumvention technology. "[T]he anti-trafficking provision of the DMCA is implicated where one presents, holds out or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it."[126] The court classified various links from the defendant's site to other sites based upon the amount of material available on the linked site, *in addition to* the DeCSS program.[127] Some links were designed to begin downloading DeCSS as soon as the user selected the link.[128] The court held that for this type of link, "[d]efendants are engaged in the functional equivalent of transferring the DeCSS code to the user themselves."[129] In other instances where the defendant's link takes the user to a web page that has no content other than a selection to begin downloading DeCSS, the court stated that the defendant still is considered to be trafficking in circumvention technology.[130]

The court noted that the decision is much more difficult if the defendant links to a web page or site that contains "a good deal of content other than DeCSS but that offers a hyperlink for downloading, or transferring to a page for downloading, DeCSS."[131] The court held, however, that in this particular case the defendants "urged others to post DeCSS . . . then linked their site to those 'mirror' sites . . . and proclaimed on their own site that DeCSS could be had by clicking on the hyperlinks on defendants' site. By doing so, they offered, provided or otherwise trafficked in DeCSS."[132]

125. *Reimerdes*, 111 F. Supp. 2d at 325.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

C. Rejection of First Amendment Defenses

The defendants in the *Reimerdes* case argued that the DeCSS software was protected speech under the First Amendment and that the DMCA was therefore unconstitutional.[133] The court acknowledged that computer code is constitutionally protected expression and proceeded with a First Amendment analysis.[134] The court held section 1201 of the DMCA to be a content-neutral restriction on speech because the purpose of the law was to regulate the functionality of the computer code (to circumvent technological protection measures) rather than to suppress the ideas of the computer programmers who created DeCSS.[135] The court ruled that the government's interest in protecting copyrighted works is unrelated to the suppression of speech.[136]

The court compared DeCSS to the biological spread of disease.[137] Unlike a common source epidemic where a non-contagious disease is spread only by the originating source; in a propagated outbreak epidemic, the disease spreads from person to person.[138] A common source epidemic spreads slowly and can be traced back to its source, much like tracing back a large-scale piracy operation to the printing press where the infringing copies are printed.[139] A propagated outbreak epidemic spreads exponentially and finding the "source" does not prevent further spread of the disease since each infected individual becomes a new source.[140] Therefore, the causal link between trafficking in circumvention technology and its improper use is close enough and harmful enough to restrict dissemination of the computer code based on its functionality.[141]

The court stressed the narrowness of its holding, stating that the restriction imposed (a permanent injunction on distribution of DeCSS) is limited:

> (1) to programs that circumvent access controls to copyrighted works in digital form in circumstances in which

133. *Id.* at 327.
134. *Id.* at 329.
135. *Id.*
136. *Id.* at 330.
137. *Id.* at 331.
138. *Id.*
139. *Id.*
140. *Id.* at 332.
141. *Id.* at 331-32.

> (2) there is no other practical means of preventing infringement through the use of the programs, and (3) the regulation is motivated by a desire to prevent the performance of the function for which the programs exist rather than any message they might convey.[142]

The court rejected the defendants' argument that the injunction would be an impermissible prior restraint.[143]

The defense also claimed that section 1201(a)(2) is unconstitutional because it is overbroad, arguing that the ban on trafficking in circumvention technology makes it difficult or impossible for those without the technical expertise to circumvent technology for permissible uses, such as fair use.[144] The court noted that where a statute targets primarily conduct rather than speech, the overbreadth of the statute must be substantial.[145] The court refused to consider overbreadth because (1) the interests of third parties are varied and thus the record is inadequate to determine whether their ability to engage in fair use is substantially hampered, (2) "there is no reason to suppose here that prospective fair users will be deterred from asserting their alleged rights by fear of sanctions imposed by the DMCA or the Copyright Act," (3) the law regulates technology "that is principally functional in nature," and (4) the statute contains an exception for encryption research.[146]

The court then addressed the constitutionality of the DMCA's ban on linking to web sites that contain circumvention software.[147] Applying intermediate scrutiny used for content-neutral regulations, the court held that the same important governmental interest unrelated to suppression of expression was at stake as the prior analysis.[148] As to whether the regulation is the least restrictive means of achieving that interest, the court noted that enjoining web sites that post the software would be more effective and less restrictive than enjoining the use of links to those web sites.[149] However, given the

142. *Id.* at 333.

143. *Id.*

144. *Id.* at 336.

145. *Id.* at 337 (citations omitted).

146. *Id.* at 339.

147. Earlier in his opinion, Judge Kaplan had held that linking, for the purpose of disseminating circumvention technology, to a web page that contained little content other than the circumvention software was prohibited by the statute and could be enjoined. *See supra* nn. 126 - 132 and accompanying text.

148. *Reimerdes,* 111 F. Supp. 2d at 339.

149. *Id.* at 340.

global nature of the Internet, it is likely that many of those web sites would be outside the jurisdiction of the United States.[150] Therefore, prohibiting the use of links would be the only effective means of materially advancing the government's interest.[151]

The court then noted the likelihood that liability for linking to sites, which contain prohibited circumvention technology, is likely to have a chilling effect on speech by significantly reducing the use of linking technology. Comparing the problem to that which faces the press under defamation law, the court crafted a response to protect those who create links from strict liability:

> Accordingly, there may be no injunction against, nor liability for, linking to a site containing circumvention technology, the offering of which is unlawful under the DMCA, absent clear and convincing evidence that those responsible for the link (a) know at the relevant time that the offending material is on the linked-to site, (b) know that it is circumvention technology that may not be lawfully offered, and (c) create or maintain the link for the purpose of disseminating that technology.[152]

The district court ruled in favor of the plaintiffs, issuing a permanent injunction prohibiting the defendants from posting DeCSS software on their web site or linking to other web sites for the purpose of distributing DeCSS software.[153]

D. Key Issues on Appeal

The defendants filed their appeal with the Second Circuit on January 19, 2001.[154] Various amici briefs in support of defendants were filed soon thereafter.[155] Plaintiffs filed their reply brief in February 2001.[156] A summary of *a few* of the key issues discussed in

150. *Id.*

151. *Id.* at 339-40.

152. *Id.* at 341.

153. *Id.* at 346.

154. Br. of Pet., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2001) (available at <http://www.eff.org/IP/Video/MPAA_DVD_cases/20010119_ny_eff_appeal_brief.htm>).

155. *E.g.* Br. of Amicus Curiae Intell. Prop. L. Profs. in Support of Def.-Appellants, *Universal City Studio*, 273 F.3d 429 (available at <http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_lawprofs_amicus.htm>) hereinafter Br. of Amicus Curiae Intell. Prop. L. Profs.), Br. of Amici Curiae Profs. Benkler and Lessig, *Universal City Studios*, 273 F.3d 429 (available at <http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_2profs_amicus.htm>).

156. Br. of Respt., *Universal City Studios*, 273 F.3d 429 (available at

the appellate briefs follows.

The defense argues that the publication of DeCSS is an expressive act protected by the First Amendment because (1) the code was published by a news magazine as part of a journalistic enterprise, (2) the code itself is protected expression, and (3) publication of DeCSS allows end users to engage in fair use, which is protected by the First Amendment and the Copyright Clause.[157] Arguing first that the statute should be held up to strict scrutiny, the defense argues that the statute targets specific content: speech that explains how to circumvent technological measures.[158] The defense then argues that the statute fails even intermediate scrutiny because it is not narrowly tailored since it effectively eliminates most fair uses and does not provide alternative means of expressing the content of DeCSS.[159] The defense also argues that, similar to speech, the links to DeCSS are protected speech and at most rise to the level of advocacy of unlawful action, not punishable incitement.[160]

The plaintiffs reply that the statute should be examined under intermediate scrutiny because it targets conduct and not speech, noting that the law targets the non-communicative impact of the expression at issue.[161] The plaintiffs assert that the statute and Judge Kaplan's permanent injunction pass intermediate scrutiny, stating that the statute is narrowly tailored since it only prohibits disseminating anti-circumvention devices and does not prohibit research or protest against the DMCA.[162] The plaintiffs support Judge Kaplan's ruling that Corley does not have standing to raise a fair use defense.[163] The plaintiffs argue that the defendants knowingly linked to DeCSS for the purpose of distributing the circumvention technology, thus making the incitement test irrelevant.[164]

<http://cryptome.org/mpaa-v-2600-bpa.htm>).

157. Br. of Pet., *Universal City Studios*, 273 F.3d 429.

158. *Id.*

159. *Id.*

160. *Id.*

161. Br. of Respt., *Universal City Studios*, 273 F.3d 429.

162. *Id.*

163. *Id.*

164. *Id.*

VII
Analysis

While the legal arguments on each side of this case are intricate and complex, some broader policy questions emerge.

• First, is the fair use doctrine constitutionally mandated to reconcile copyright with the Copyright Clause and the First Amendment?

This article argues that fair use does support important free speech interests that are not adequately protected by the idea/expression dichotomy or the limited duration of copyright. However, it must be acknowledged that no court has made so forceful a statement to date. Yet, as society enters the "digital age" of the 21st century, it is clear that information influences our culture and conception of reality as never before.

Section 1201(b), which prevents the manufacture or distribution of devices that circumvent the technological measures used to protect the copyright owner's rights under the act, allows copyright owners to dramatically expand their control over their works.[165] Copyright owners might install technological measures that prevent *all* copying, distribution, public performance, and public display of their works (since these are some of the rights granted to the copyright owner), even though there are countless situations where copying, distribution, display, etc. are permitted under the statute. Users are still free to circumvent these technological measures for a myriad of noninfringing uses. The problem is that section 1201(b) now outlaws the manufacture and distribution of the tools needed to accomplish legal circumvention.[166]

Judge Kaplan noted the possible harm to fair use while evaluating the First Amendment arguments of the defense.[167] He articulates three ways in which someone might wish to make fair use of a protected DVD: (1) quotation of the script, (2) use of the audio soundtrack, and (3) use of the graphic images.[168] Judge Kaplan notes that the restrictions do not prevent anyone from quoting the dialogue contained on the DVD.[169] The biggest threat posed by the DMCA is

165. 17 U.S.C. § 1201(b).

166. For a more in-depth discussion of the ramifications of these provisions for free speech, see Benkler, *supra* n. 9; Nimmer, *supra* n. 9; Samuelson, *supra* n. 9.

167. *Reimerdes*, 111 F. Supp. 2d at 337.

168. *Id.*

169. *Id.* at 338.

that many users will be unable to copy the soundtrack or visual images contained in the DVD. [170] Judge Kaplan then conveniently chose examples of prevented uses that make the harm seem trivial indeed:

> A television station might want to broadcast part of a particular scene to illustrate a review.... A musicologist perhaps would wish to play a portion of a musical sound track. A film scholar might desire to create and exhibit to students small segments of several different films to make some comparative point about the cinematography or some other characteristic.[171]

These examples suggest that the law creates no harm other than inconvenience; that the poor film professor will just have to bring all her DVDs to class rather than copying the various scenes onto one disk.

The real harm is far more subtle. All of these uses allow educators to praise or critique the original work encoded on the DVD, but none of these uses go to the heart of fair use – namely the transformation of the original work. The ability to appropriate texts for the purpose of transformation, for example by juxtaposing scenes from various films to create new meanings, is a vital form of democratic dialogue. Artists often use such techniques to reveal new truths about our society and ourselves. The new law threatens precisely these legitimate uses of copyrighted texts, especially the use of visual works such as motion pictures.

Copyright law developed during an era when the written word was the primary means of communication and transmission of culture. Yet, as the world enters the 21st Century, our communication and culture is based increasingly on visual texts such as motion pictures, television commercials, and computer graphics. "We live in a world where nothing is what we were taught it was. Art is business, business is war, war is advertising, and advertising is art."[172] These "texts" are just as significant as the written word in shaping our understanding of the world. The anti-circumvention provisions of the DMCA limit the ability of individuals to actively participate in the construction of meaning. Even though we retain the right to criticize the media artifacts that create our culture, we lose the ability to control the process of cultural production itself.

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170. *See id.*
171. *Id.* at 337.
172. Negativland, *supra* n. 2, at frontispiece.

From an economic standpoint, the argument in favor of transformative uses is a difficult policy position to defend. One can quantify the cost to consumers that copyright infringement produces, which is no doubt significant. In addition, few consumers are interested in actively transforming cultural texts and engaging in the kinds of transformative uses that are threatened by the new law. Most consumers would likely accept the trade-off between more efficient production of copyrighted works and fewer opportunities for transformative works. Justin Hughes argues that the "silent majority" of consumers would prefer that cultural texts have stable meanings and that the process of "recoding" which gives these works new meanings imposes an additional cost on those consumers.[173]

On the other side of the policy argument, it is impossible to quantify the cost to society when fewer transformative works are produced. This article argues that the threat to free speech and control over cultural dialogue and debate should be considered a potential cost to society. This is especially true if one accepts the argument that the battle over contested meanings is essentially a *political* struggle.[174] What makes the anti-circumvention provisions so troubling is that they prevent courts from engaging in fair use analysis. Indeed, as technology becomes the primary means of protecting content, courts (and the constitutional limits on copyright) are removed entirely.

• Second, can Congress give copyright owners powers that extend their control beyond the Copyright Clause?

Congress intentionally placed sections 1201 and 1202 outside of the parameters of copyright. The Committee acknowledged and dismissed the fears of copyright scholars that these new provisions would grant copyright owners greatly enhanced powers.[175] Sixty-two law professors wrote to Congress, stating:

> [E]nactment of [the anti-circumvention provisions] would represent an unprecedented departure into the zone of what might be called paracopyright—an uncharted new domain of legislative provisions designed to strengthen copyright protection by regulating conduct which traditionally has fallen outside the regulatory sphere of intellectual property law.[176]

173. Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 Tex. L. Rev. 923 (1999).

174. See the discussion of fair use, *supra* Part II.

175. H.R. Rpt. 105-551 (II), at 24-25.

176. *Id.*

The Committee merely responded, "As technology advances, so must our laws."[177]

Sections 1201(a) and 1201(b) create separate but distinct threats to the current copyright law. Section 1201(a), which grants copyright owners technological control over access to their works, appears to do no more than prevent users from "stealing" the content.[178] From this perspective, section 1201(a) is very similar to the laws prohibiting the theft of cable and wireless programming.[179] When Congress added the prohibition on cable theft in the Cable Communications Policy Act of 1984 there appears to have been no public outcry regarding the potential loss of access to copyrighted works.[180] The key distinction between restricting access to subscription television service and restricting access to all copyrighted works is that the first sale doctrine is inapplicable to subscription television service.[181] The first sale doctrine allows the owner of a lawful copy to sell, lease, lend or otherwise dispose of that copy.[182] This clause allows video stores to rent movies, bookstores to sell used books, record stores to sell used CDs, and individuals to sell, lend, or give away books, videotapes, CDs, etc. Under section 1201(a), copyright owners potentially could adopt technological measures that prevent anyone but the original buyer from accessing the work, thereby defeating the first sale doctrine.[183]

The District Court in *Reimerdes* acknowledged that the DMCA as applied will have the practical effect of severely limiting fair use and potentially giving copyright owners control over works that are in the public domain.[184] Therefore, the law clearly extends control beyond that authorized under the Copyright Act and the Copyright Clause. In an *amici* brief filed by a group of 47 law professors in support of Corley and his fellow defendants, a compelling argument is made that Congress does not have the authority to grant copyright owners powers under the Commerce Clause or the Necessary and

177. *Id.* at 25.

178. 17 U.S.C. § 1201(a).

179. *See supra* n. 117.

180. *See generally* Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. § v553 (2001)); H.R. Rpt. 98-934, at 83-85 (Aug. 1, 1984).

181. 17 U.S.C. § 109 (2001).

182. *Id.* § 109(a). However, possessors are prohibited from renting sound recordings and computer programs for personal advantage. *Id.* § 109(b)(1)(A).

183. *See supra* n. 21 and accompanying text.

184. *Reimerdes*, 111 F. Supp. 2d at 338, 338 n. 245.

Proper Clause, that are denied to Congress under the Copyright Clause and the First Amendment.[185]

• Third, can Congress constitutionally overturn the staple article of commerce doctrine articulated in *Sony* if doing so significantly infringes on free speech?

The DMCA's anti-circumvention provisions and the *Reimerdes* decision offer insight into how the law of copyright is changing. Rather than focusing solely on users who commit copyright infringement, copyright owners are targeting the individuals and corporations that provide the technology that facilitates infringement. In the past, these defendants could be found liable only through the theory of contributory infringement articulated in *Sony*[186] or the limited circumstances surrounding theft of television service and serial copying of digital recordings.[187]

The *Reimerdes* case concerns Congress' ability to overturn *Sony,* since this is the practical effect of the DMCA. Or, phrased more generally, to what extent can the state regulate technology that implicates free speech interests? There are compelling arguments on both sides. Copyright owners undoubtedly have a right to use technological measures to control their content. The question is whether the government can use the force of the state to protect those technological measures.

The DMCA limits the scope of the *Sony* ruling by prohibiting the use of circumvention technology unless that technology has a "commercially significant purpose or use *other than to circumvent a technological measure.*"[188] This clause is significantly more limiting than the test for contributory infringement outlined in the *Sony* holding. Under *Sony*, the purveyor of the technology need only demonstrate that there are substantial noninfringing reasons for using the technology.[189] Under the DMCA, it is irrelevant whether the end user is committing copyright infringement. Instead the question becomes whether the circumvention technology has substantial uses other than to defeat the copyright owner's anti-circumvention technology.[190]

One distinction between *Sony* and the anti-circumvention

185. Br. of Amicus Curiae Intell. Prop. L. Profs., *Universal City Studios*, 273 F.3d 429.
186. *See supra* Part III.
187. *See supra* Part IV.
188. 17 U.S.C. § 1201(a)(2)(B) (emphasis added).
189. *Sony*, 464 U.S. at 456.
190. 17 U.S.C. § 1201.

provisions is that *Sony* asks whether the technology has substantial non*infringing* uses, while section 1201 of the DMCA asks whether the technology has substantial non*circumventing* uses.[191] Whether there are substantial noninfringing reasons to use circumvention tools is irrelevant. For example, under *Reimerdes*, a court might find that the use of DeCSS to view DVDs on Linux operating systems is a substantial noninfringing use. Therefore, under *Sony,* the distribution of DeCSS might not constitute contributory copyright infringement—just as the use of VCRs for time-shifting was considered acceptable. However, as Judge Kaplan noted, such an analysis is irrelevant under section 1201 of the DMCA, which only asks whether DeCSS has any substantial uses other than to unlock the CSS copy protection system.[192] Thus, the anti-circumvention provisions of the DMCA increase the scope of the copyright owner's power by (1) creating a cause of action separate from contributory infringement and (2) limiting the reach of the statute's defenses to copyright infringement.

If a copyright owner distributed her content only to movie theaters, few would suggest that anyone had a right to enter the theater free of charge to see the uncopyrighted portion of the content. Nor is it likely that a ban on recording devices in the theater, enforced through state action, would be considered an abridgement of free speech. Similarly, suppose HBO were to produce a documentary that contained mostly uncopyrightable expression. HBO could impose limits on public access to that documentary (for example through encryption and subscription fees), and the state could prevent individuals from finding ways around those limits.[193] So when discussing the public performance of content, most commentators accept the fact that copyright owners can impose limits on access to the performance, regardless of the resulting impact on fair use or uncopyrightable expression. The state can assist copyright owners in enforcing those limits without running afoul of the Constitution. In a sense, copyright owners are merely asking for the same control when they choose to distribute copies of their works instead of performing them. One could argue that the ban on circumvention technology simply gives owners the same control they may already exert over access to public performances.

On the other hand, it would clearly be unconstitutional for the

191. *Compare Sony*, 464 U.S. at 456 *with* 17 U.S.C. § 1201.

192. *See supra* n. 116 and accompanying text.

193. See the discussion of the Communication Act's ban on "black boxes," *supra* Part IV(A).

government to outlaw the distribution of printing presses, copy machines, or pencils to prevent the harm that counterfeiting or criticism may inflict. Those opposed to the DMCA's restrictions on circumvention technology argue that, like a ban on pencils, the ban on circumvention software imposes a burden on speech that far outweighs the harm of potential copyright infringement. Since the government's substantial interest in enacting the DMCA was to prevent the harm of copyright infringement, it is appropriate that the court look at the impact of the law on legitimate noninfringing uses. The *Reimerdes* court refused to engage in such an analysis.

In addition, under *Reimerdes*, the law appears to give the copyright owner control over what hardware may be used to gain access to the copyrighted material. Imagine a Sony compact disk that could only be played legally on a Sony CD player, just as the old Sony Betamax videotapes were incompatible with other videotape players. Under the DMCA, it would be illegal to build a videotape player compatible with Betamax tapes if doing so would circumvent an "access technology." The *Reimerdes* court noted that the DVD Copy Control Association is willing to license the technology for Linux operating systems, and that it is possible that a refusal to license could result in antitrust litigation.[194] However, the DMCA potentially forces the user to view her DVD on a player of the copyright owner's choosing. The motion picture industry has acknowledged that it uses CSS in part to limit access to DVDs to particular geographic regions, asserting that the copyright owner has the right to grant authorization to use copyrighted content only on specific technologies of the copyright owner's choosing. Users who own lawful copies of DVDs containing the CSS encryption system would be prohibited from playing their DVDs on unauthorized systems, even though playing the DVD on an unauthorized system would not be considered copyright infringement.[195]

VIII
Conclusion

Copyright owners used the 1984 prohibition on technology, which was designed primarily to prevent the theft of cable and

195. *Reimerdes*, 111 F. Supp. 2d at 311.

195. In the *Reimerdes* case, the court noted in dicta that the legislative history of the DMCA suggests that it would *not* be a violation of section 1201(a) for a user who has obtained authorized access to circumvent an access restriction, but the plain language of the statute offers no such exception. *Id.* at 318.

satellite service, to gain technological control over their content without resorting to copyright law. Their timing was perfect because the *Sony* decision, also rendered in 1984, limited the use of copyright law to control technology. The recording industry added new technological control measures in 1992 with the AHRA's requirement that digital tape recorders be equipped with anti-copying technology. The DMCA goes dramatically beyond the limited protection offered to technological measures under the Communications Act and the AHRA.[196]

The DMCA was passed with the express purpose of facilitating electronic commerce and protecting intellectual property rights.[197] The federal government's intervening brief on behalf of the plaintiffs notes that Congress enacted the DMCA to "[join] an international effort to make the Internet a more secure business forum."[198] Bowing to the protests of librarians, educators, and others, the law authorizes the Copyright Office to create exemptions allowing certain users to circumvent the technological restrictions adopted by copyright owners.[199] However, those users will be hard pressed to find the circumvention tools necessary to circumvent the protection technology since the same statute prohibits both the manufacturing and distributing of circumvention tools.

The DMCA encourages copyright owners to adopt technological measures that provide extralegal protection for their works, and offers strong legal protection for these technological measures. Copyright owners can use these measures to expand control over their works beyond the limits created by the Copyright Act, effectively limiting the first sale doctrine, fair use, and the other provisions of the law that achieve copyright's delicate constitutional balance. If other courts adopt the same interpretation of the law as Judge Kaplan, the statutory and constitutional limits on copyright will be more difficult to enforce.

The *Reimerdes* case offers a glimpse of one possible outcome of recent trends in copyright law. Copyright owners appear to be making a coordinated attack on technology in an effort to gain more control over their works. For example, while the lawsuits against Napster and Scour (like all cases) are fact-specific, the fact remains that the

196. In addition, the DMCA also requires analog VCRs to incorporate anticopying technology for the first time. 17 U.S.C. § 1201(k).

197. H.R. Rpt. 105-551 (II), at 21-23.

198. Br. of Intervenor U.S.A., *Universal City Studios*, 273 F.3d 429 (available at <http:/www.cryptome.org/mpaa-v-2600-usa.htm>).

199. *See supra* n. 90 and accompanying text.

recording industry has chosen to sue the purveyor of the technology rather than the individual users who are committing infringement.[200] The same is true for MP3Board.com, which the RIAA has sued to prevent automated search engines from providing links to MP3 web sites.[201] These cases, along with *Reimerdes*, all involve technologies that enhance the ability of individuals to share information in digital form.

There is no simple solution to problem of increased infringement as a result of new technology. But the focus on restricting technology sets a dangerous precedent that threatens innovation, efficiency, the development of communication networks, and free speech. A better solution is to focus on using technology to develop more efficient methods of tracing infringing activity to its source. Thus, the use of digital watermarks or other means to hold individuals responsible for their infringing behavior is less onerous than restricting the use of communication technology.

The trend in legislation and lawsuits is to focus on technology rather than infringing conduct. While it is easy for policymakers to offer technological solutions in an age of rapid technological change, such solutions do not allow for important free speech safeguards that have been developed over the years. As policymakers debate laws that enhance electronic commerce, they must not lose sight of the fact that the internet's true strength and promise is as a communication medium—not a sales medium. As Lawrence Lessig notes:

> In every context that it can, the entertainment industry is trying to force the Internet into its own business model—the perfect control of content. From music (fighting MP3) and film (fighting the portability of DVD), to television, the industry is resisting the Net's original design. It was about the free flow of content; Hollywood wants perfect control instead.[202]

Technological solutions usurp the important role of courts in balancing the interests of copyright owners and the general public. This is but one result of the change in copyright from a legal concept

200. John Borland, *CNET News.com, RIAA Asks Judge to Pull All Major-Label Songs OFF Napster* <http://news.cnet.com/news/0-1005-200-2066662.html> (June 12, 2000).

201. Brad King, *Wired, RIAA: No Hyperlinking Allowed* <http://www.wired.com/news/print/0,1294,37227,00.html> (June 26, 2000).

202. Lawrence Lessig, *The Standard, Cyberspace Prosecutor* <www.thestandard.com/article/display/1,1151,10885,00.html> (Feb. 21, 2000).

to a technological concept. As Negativland points out:

> [T]he commercial entrepreneurs who now own and operate mass culture are apparently intent on obliterating all distinctions between the needs of art and the needs of commerce .... Both our courts and our corporations are now in the untenable position of assuming that once a work becomes a saleable object, that becomes its only significant role in society, and that role is the only one that the law should be concerned with.[203]

203. Negativland, *supra* n. 2, at frontispiece.